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SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 537

ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL

TRANSPORTATION UNDER 49 U.S.C. 10903

Decided: June 18, 1997

BACKGROUND

The ICC Termination Act of 1995 (ICCTA) revised the law governing applications by rail carriers to abandon or discontinue service over lines of railroad and related offers of financial assistance that would continue rail service after approval of abandonment or discontinuance by the Surface Transportation Board (Board). Accordingly, by decision served December 24, 1996 (the Decision), we revised 49 CFR part 1152 to implement the changes and update the pertinent regulations, and to streamline the abandonment and discontinuance process consistent with the new law. We also made conforming changes to the environmental rules at part 1105. These new regulations, which were adopted following a notice and comment rulemaking proceeding, went into effect on January 23, 1997.

Petitions for reconsideration of the Decision were filed on January 27, 1997, individually by the Association of American Railroads (AAR) and the Illinois Legislative Board-United Transportation Union (IL-UTU) and jointly by IMC Global Operations Inc., Georgia Public Service Commission, and Kansas-Colorado-Oklahoma Shippers Association (Joint Petitioners). A petition for reconsideration was filed on January 28, 1997, by the National Association of Reversionary Property Owners (NARPO). On January 24, 1997, the American Farm Bureau Federation filed comments in support of NARPO's petition. On January 17, 1997, the Georgia Department of Transportation (GaDOT) and on January 27, 1997, Ms. Jayne Glosemeyer filed comments. On January 27, 1997, the Union Pacific Railroad Company (UP) filed a petition for clarification. Finally, replies to these pleadings were filed by the Rails to Trails Conservancy (RTC) on February 14, 1997, and by AAR on February 18, 1997.

The petitioners and commenters disagree with, or seek clarification of, certain aspects of the new regulations. The pleadings, to a large extent, reargue issues presented in response to the notice of proposed rulemaking (NPR) served March 15, 1996. In this decision, we address the major concerns that have been raised. For the reasons discussed below, we will make some clarifying changes to the rules, make delegations of authority that would permit agency employees to carry out certain responsibilities under these procedures, and correct one typographical error.

DISCUSSION AND CONCLUSIONS

1. *Notice Issues*. NARPO continues to argue that adjoining property owners should receive actual notice of proposed abandonments, not merely notice through *Federal Register* publication. But, as AAR explains, NARPO overlooks the other notice that is provided to the public of proposed abandonments and of the possibility that the right-of-way may be used as a trail. As we pointed out in the Decision (at 4), we now require a local newspaper notice in each county affected, which like the *Federal Register* notice specifically alerts the public that, following the abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use, and advises how the public may participate in the

Board proceeding. Moreover, the description of a rail line now must contain the zip codes through which the line runs, and there is usually widespread local publicity of trail proposals, including local public hearings.[1]

Nothing in NARPO's pleading shows that requiring actual notice would be either feasible or warranted. To reemphasize what we stated in the Decision, our current procedures ensure extensive notice. There is simply no practical way to name and locate every landowner along a line proposed for abandonment and/or trail use. Hundreds if not thousands of landowners could potentially be interested in a single line. Also, no available source provides readily ascertainable information on the chain of title, the names and addresses of current landowners, the nature of their property interests, and the circumstances, if any, that might trigger a reversion in a particular state.

It is important to note that any interest that adjoining landowners may have in abandonment cases before us is dependent on approval of the abandonment, the filing of a trail use request, the negotiation of a trail use agreement, and a showing that they have a property interest in the right-of-way. As established by the Supreme Court in *Preseault v. ICC*, 494 U.S. 1 (1990), landowners are limited to remedies under the Tucker Act to obtain just compensation if they can demonstrate to the Court of Federal Claims that a compensable taking has occurred. Accordingly, failure to receive actual notice of proposed abandonments would not prejudice any rights which such parties may have.

NARPO believes that the recent court decision in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*Preseault*), makes the notification issue more important. But *Preseault* dealt only with the question under the facts of that case of whether establishment of a trail constitutes a taking under the Fifth Amendment giving rise to a claim for compensation under the Tucker Act. That case had nothing to do with the merits of the abandonment proceeding or the imposition of a trail condition. Moreover, the court's findings were not dependent on any notice of, or participation in, the abandonment proceeding that had taken place before the Interstate Commerce Commission.

2. *Uniform Schedule*. IL-UTU argues that the time frame of 110 days to process abandonment applications is too short to properly handle all of the relevant issues in such proceedings. It requests that we modify the new rules and return to the previous 255-day schedule. In our view, this issue was amply considered and correctly resolved in both the NPR and the Decision, and no further consideration or change is necessary. As previously explained, our new uniform schedule will allow for full public participation and timely resolution, thus benefitting all interested parties.

3. *Contents of the Application*. Another area of concern involves the materials an applicant must include in its abandonment application. We address the issues raised in turn.

A. In the NPR we had proposed that an applicant would be required to file *all* relevant workpapers and supporting documents with an application. Based on AAR's concern that this would lead to disputes concerning what documents constitute "workpapers" and create an unduly burdensome process, we clarified the requirement in the Decision. There, we explained that we expected an applicant to supply as part of its application the workpapers and supporting documents the applicant believes are necessary to present a complete or prima facie case. We emphasized, however, that our clarification did not affect the requirement that an applicant must submit its entire case as part of its application and that an applicant has the burden of proof to show that its proposed abandonment is in the public interest.

Joint Petitioners argue that all relevant workpapers and supporting documents should be included in the applicant's evidence in support of an application or, at a minimum, that these materials should be required to be furnished upon request of a party. They contend that any lesser requirement improperly delegates authority to railroads to decide which workpapers and supporting documents to furnish and which to withhold.

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[1] NARPO opposed our proposal in the NPR to include that organization in the list of entities due to receive the notice of intent. Therefore, we did not include that requirement in our final rules.

Joint Petitioners' claims are not persuasive. Our clarification is reasonable. All that the clarification does is eliminate the need to attach every conceivable document that possibly could be considered to be a "workpaper" to an application. There is no reason to believe that protestants will be harmed if we allow the applicant to decide what documentation to include. Rather, the railroads likely will provide adequate supporting documentation because the burden of proof remains on the applicant to show that the proposed abandonment or discontinuance is in the public interest. Furthermore, our rules already permit requests for additional relevant workpapers or supporting documents. We expect that railroads will comply with any reasonable requests for such information.

B. Joint Petitioners and IL-UTU object to our elimination of some of the historical cost and revenue data for periods prior to the Base Year that were required in the past.[2] They argue that such information is important to determine how the line will operate in the Forecast Year, citing a 20-year old ICC decision, *Chicago and North Western Transp. Co. - Abandonment*, 354 I.C.C. 114, 119 (1977). AAR responds that petitioners have not shown how such data have been useful in any recent abandonment cases and that the burden of producing the data would be substantial.

We are not persuaded that additional historical data are needed. As we explained in the Decision, profits or losses on a line segment in prior years typically do not provide a particularly useful basis on which to judge the line's current and future financial viability. Rather, the Board's primary measures of financial condition are the operations in the Base Year and the Forecast Year, which recognize the current and future viability of the line. In short, the information required by the final rules is sufficient to enable us to analyze appropriately all the relevant issues, and no changes to those requirements will be made.

C. Joint Petitioners and IL-UTU also oppose the elimination of the requirements that an applicant show the effects of the abandonment on carriers operated under common control with the applicant, and submit its current balance sheet and income statement. We agree with AAR that there is no need to require this information. While the Board, in the course of balancing the competing interests, can require continuation of a line operating at a loss, the overall profitability of any rail system composed of commonly-controlled carriers is usually not an issue in the cases before us. Thus, the burden of providing such information should not be imposed.

D. Finally, Joint Petitioners and IL-UTU contend that data on bridge or overhead traffic should be required to be supplied even if the applicant will retain the bridge traffic after abandonment. But our final rules reasonably require submission only of data on bridge traffic that will not be retained. It is well settled that a carrier cannot be required to maintain a line in service to handle overhead traffic that it can reroute.[3] Therefore, data on such traffic routinely have been excluded. Data on bridge traffic that will be retained can be supplied by the applicant, or obtained through discovery, if it is relevant in a particular case. There is, however, no need to require these data in every case.

4. *Notice of Consummation*. Petitioners and commenters request various changes regarding our new notice of consummation requirement. Specifically, AAR notes that it would prefer that any such notice be discretionary, as we had proposed in the NPR, but states that it can support a mandatory notice requirement as long as some flexibility in its usage exists. AAR explains that railroads may require more than one year to consummate, or fully exercise, some abandonments[4] and proposes that we allow a railroad to obtain an automatic one-year extension

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[2] Based on the comments, we included more historical data in our final rules than we had proposed in the NPR.

[3] *Baltimore & O.R. Co. Abandonment*, 354 I.C.C. 240 (1978).

[4] AAR gives several examples of why particular abandonments may require additional time before consummation. More than a year may be needed to reroute the railroad's traffic. The railroad may also wish to give shippers time to revise shipping plans or agree to give shippers or public agencies time to develop new traffic for the line. *Bona fide* operational reasons such as the

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upon request.[5] AAR adds that additional time should be available through the filing of a petition for waiver where good cause is shown, but believes that a waiver petition should not be necessary for a one-year extension.

We agree that, from time to time, in some abandonment proceedings, a railroad may require more than one year to consummate an abandonment. Therefore, some type of procedure for obtaining an extension is appropriate. However, inasmuch as many proceedings will already have some type of condition (such as an environmental, public use, or trail condition) that creates a legal or regulatory barrier to consummation, and thus delays the notice of consummation period until the condition lapses or has been fulfilled, the number of proceedings where more time is needed should not be great.[6] Moreover, no need for an automatic extension has been shown. A railroad's operational need for more time in some cases can be met if we clarify that, on a case by case basis, with good cause shown, a railroad can file an extension request with us so long as it does so sufficiently in advance of the deadline for notifying us of consummation to allow for timely processing. On the other hand, allowing for any sort of an automatic extension would conflict with our intent that the consummation issue not be held open indefinitely.

While AAR seeks an automatic extension for the filing of notices of consummation, NARPO requests that the Board shorten the time period for the filing of consummation notices to 180 days or less. We continue to believe that the one-year time period is appropriate. As the Decision states, the one-year period will bring more timely closure to the abandonment process. At the same time, it is long enough to give carriers adequate time, for example, to hold open the possibility that new shippers will seek rail service or that the right-of-way could be used as a trail or for public use under 49 U.S.C. 10905.

In response to comments, we will clarify the notice of consummation rule to address those situations where, at the end of the one-year time period, there are still legal or regulatory barriers to consummation. In such situations, an applicant will have 60 days from the date of satisfaction, expiration, or removal of the legal or regulatory barrier to file a notice of consummation. Moreover, as explained above, we will clarify our rule specifically to state that an applicant, upon a showing of good cause, can request an extension so long as it does so sufficiently in advance of the expiration date to allow for timely processing.

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need to use the track for temporary service or storage also may cause a railroad to delay implementation of an abandonment for more than a year.

[5] RTC supports that request.

[6] As RTC states, we retain jurisdiction until an abandonment is fully consummated, and environmental, historic preservation, public use, trail use and other conditions prevent the railroad from consummating the abandonment until the condition has been fulfilled or has lapsed. Section 1152.29(e)(2) of the new regulations specifically provides that notices of consummation will be conclusive on the point of consummation *unless* there are outstanding conditions. If there are outstanding conditions, a railroad *cannot* consummate until all conditions have been satisfied. Two additional points raised by NARPO and RTC involving the Trails Act require clarification. First, if the parties successfully negotiate a trail *agreement*, no notice of consummation is required (or permitted) until after the trail use ceases and the railroad receives authority to fully abandon the line. That is so because Congress made it clear that there can be no abandonment if there is interim trail use on the line. See 16 U.S.C. 1247(d) ("interim trail use shall not be treated for [any] purposes . . . as an abandonment of the use of such right-of-way for railroad purposes"). Similarly, if the parties are still negotiating a trail agreement at the end of the Trails Act negotiation period (or are continuing to negotiate the implementation of any other of our conditions that preclude consummation), the line will not be considered to be fully abandoned until a consummation notice is filed as required under our rules. *See Birt v. STB*, 90 F.3d 580, 585, *re'hg denied*, 98 F.3d 644 (D.C. Cir. 1996), indicating that in such a case the railroad's actions demonstrate an intent *not* to abandon by its continued willingness to negotiate.

UP and AAR seek clarification that our new notice of consummation requirement applies only to abandonment proceedings filed after the enactment of ICCTA or the effective date of the new rules, respectively. We did not intend this provision to apply retroactively. Accordingly, we clarify that the rule requiring a mandatory notice of consummation applies only to abandonment proceedings filed *after* the effective date of the new regulations, January 23, 1997.

AAR also has questions regarding exactly what is required to consummate an abandonment. AAR asks that we make it clear that not all of the acts listed in section 1152.29(e)(2) (e.g., discontinuance of operations, salvage of the track, cancellation of tariffs) need to be taken in addition to the filing of a notice of consumation to show that the railroad has exercised the authority granted and fully abandoned the line.[7]

In response to AAR's concerns, we clarify that the *only* indispensable indicia of an intent to abandon is the filing of the notice of consummation, which will be treated as conclusive evidence that the line was abandoned on the date specified in the notice. *See* Decision at 9-10; 49 CFR 1152.29(e)(2). The acts listed in section 1152.29(e)(2) are examples of the various steps that can be taken by a railroad to signify consummation of an abandonment. Not all of them must necessarily be taken in each instance before a railroad can be found to have fully abandoned the line. Finally, we clarify that the notice of consummation requirement applies only to the exercising of full abandonment authority and not to those instances involving only a discontinuance of operations. That is so because our intent, in establishing this rule, has been to provide certainty in identifying the time when the Board's jurisdiction over a line ceases.

5. *Other Issues*. IL-UTU suggests that we continue to list carriers and their assigned AB numbers in the Appendix to part 1152. We decided to delete that list because it serves little useful purpose. Interested parties with a need for a particular carrier's AB number need simply contact the Board's Office of the Secretary. Accordingly, we will not change our rules to bring back this practice.

GaDOT requests that we modify our public use regulations to specify that the requester can ask that rail assets (i.e., tracks, ties, structures and signal equipment) be preserved in place for the duration of the public use condition period. GaDOT contends that it is the practice of the Board and our predecessor agency to deny such requests. We see no reason to amend our rules. Contrary to GaDOT's claims, requests to preserve the track and other rail assets under the public use provision are granted when the requester shows that it seeks to acquire the property for mass transit, a scenic railroad, or other public purposes that would necessitate the use of the track.[8] *See Burlington Northern Railroad Company -- Abandonment Exemption -- Between Klickitat and Goldendale, WA*, Docket No. AB-6 (Sub-No. 335X) (ICC served Feb. 7, 1992). We will continue that practice, considering these requests on a case by case basis, as has been done in the past.

Additionally, we note that in STB Ex Parte No. 527, *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings* (STB served Oct. 1, 1996), we established general procedures to expedite the handling of railroad exemption proceedings. In the event of any conflict between the generally applicable procedures set out in that proceeding and

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[7] RTC and AAR suggest that our reference to the cancellation of tariffs is obsolete since there is no longer a tariff filing requirement. However, that phrase was included to refer to the obligations railroads still have to disclose common carriage rates and service terms as well as the requirement for advance notice of increases in such rates or changes in service terms. *See Disclosure, Pub. & Notice of Change of Rates - Rail Carriage*, 1 S.T.B. 153 (1996).

[8] We note that it is not appropriate to proceed under 49 U.S.C. 10905, the public use provision, where a party seeks to continue rail freight transportation. Requests for continuation or restoration of freight service are properly pursued under 49 U.S.C. 10904, the offer of financial assistance provision, rather than 49 U.S.C. 10905. Section 10905 allows time (up to 180 days) for the requester to seek to acquire railroad properties "not required for continued rail operations" for public purposes (including highways, mass transportation, conservation, energy production or transmission, or recreation). *See Connecticut Trust v. ICC*, 841 F.2d 479, 481 (2d Cir. 1988).

the more specific procedures adopted in this proceeding for abandonments, the abandonment regulations will govern. *See also* 49 CFR 1152.60(a).

A matter regarding bankrupt carriers must also be clarified. Because Board action on abandonment applications by bankrupt railroads is advisory only, no environmental filings or analysis is necessary. This is already set forth in our environmental rules at 49 CFR 1105.5(c) but now will also be cross referenced at 49 CFR 1152.26(b).

We are also adding delegation of authority powers to the Director of the Office of Proceedings regarding certain matters in petitions for exemption and application proceedings. To parallel the procedural handling of the publication of a notice of a class exemption, the Director of the Office of Proceedings is delegated authority to publish notice of the filing of a petition for an individual exemption for an abandonment under 49 U.S.C. 10502. Also, in an application proceeding under 49 U.S.C. 10903, unless the application is found to be substantially incomplete or otherwise defective by the Board, the Director of the Office of Proceedings is delegated authority to publish the notice of filing of the application. In addition, the Director of the Office of Proceedings will continue to hold delegated authority to issue a decision on any oral hearing request. We clarify that an oral hearing request is due 10 days after the filing of an application and a decision on an oral hearing request must be issued within 15 days after the filing of the application.

Finally, it has come to our attention that there is a typographical error in 49 CFR 1152, Subpart F, which involves exempt abandonments and discontinuances of service and trackage rights. Specifically, section 1152.50(d)(2) directs the railroad to file a verified notice of exemption that includes the information required in, among others, section 1152.22(e)(5). However, the reference to section 1152.22(e)(5) is incorrect and should read 1152.22(e)(4). We will correct section 1152.50(d)(2) in this decision.

The Board certifies that these rules will not have a significant economic effect on a substantial number of small entities. As explained in the Decision, the rules should result in streamlining, improving and updating the abandonment process while ensuring the opportunity for full public participation in our proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions for reconsideration are denied.

2. The clarifications to the notice of consummation requirement (49 CFR 1152.29(e)(2)) and to the requirements for bankrupt carriers (49 CFR 1152.26(b)), the added delegation of authority powers (49 CFR 1152.24(e)(2), 49 CFR 1152.25(d)(6((i) and 49 CFR 1152.60 (a)) and the corrected notice of exemption rule (49 CFR 1152.50(d)(2)) are adopted as set forth in the Appendix to this decision, and notice will be published in the *Federal Register* on June 27, 1997.

3. This decision is effective on July 27, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX

For the reasons set forth in the preamble, title 49, chapter X, part 1152 of the Code of Federal Regulations is amended as follows:

PART 1152--ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

1. The authority citation for part 1152 continues to read as follows:

Authority: 5 U.S.C. 553, 559, and 704; 11 U.S.C. 1170; 16 U.S.C. 1247(d) and 1248; and 49 U.S.C. 701 note (1995) (section 204 of the ICC Termination Act of 1995), 721(a), 10502, 10903-10905, and 11161.

Section 1152.24 [Amended]

2. Section 1152.24(e)(2), third sentence, is amended by adding the phrase ", through the Director of the Office of Proceedings," after the phrase "in the *Federal Register* by the Board".

3. Section 1152.25 (d)(6)(i) is amended by adding the following two sentences to the beginning of the paragraph:

§ 1152.25 Participation in abandonment or discontinuance proceedings.

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(d) * * *

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(6) * * *

(i) Any oral hearing request is due 10 days after the filing of the application. The Board, through the Director of the Office of Proceedings, will issue a decision on any oral hearing request within 15 days after the filing of the application.* * *

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4. Section 1152.26 (b) is amended by adding the following two sentences to the end of the paragraph:

§ 1152.26 Board Determination under 49 U.S.C. 10903.

(b)* * * Because Board action on abandonment applications by bankrupt railroads is advisory only, no environmental filings or analysis is necessary. *See* 49 CFR 1105.5(c).

5. Section 1152.29 (e)(2) is amended by adding the following two sentences to the end of the paragraph:

§ 1152.29 Prospective use of rights-of-way for interim trail use and banking

* * * * *

(e) * * *

(2)* * * If, however, any legal or regulatory barrier to consummation exists at the end of the one-year time period, the notice of consummation must be filed not later than 60 days after satisfaction,

expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

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Section 1152.50 [Amended]

6. Section 1152.50(d)(2), second sentence, is amended by changing "(e)(5)" to "(e)(4)."

Section 1152.60 [Amended]

7. Section 1152.60(a), third sentence, is amended by adding the phrase "by the Board, through the Director of the Office of Proceedings," after the word "published".